TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1928

No. [redacted] 32

SECURITY MORTGAGE COMPANY, PETITIONER,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 10, 1927

CERTIORARI GRANTED JANUARY 23, 1928

(33,114)

1. The liability for attorneys has not accrued - the debt has not been collected by suit through the attorney: The terms of the note have not been complied or been on the maturity of the [illegible] of the mortgaged property: the obligation of the mortgage as pleaded against [illegible] does not affect the title. Neither the note nor the mortgage was sued on in State Court. The [illegible] was a bankrupt at the time proceedings before he was sued in State Court. The collection of the debt is made in the Bankruptcy Court. The suit in the State Court was not necessary [illegible]

John E Benton
Atty Gen in note. Ga Indiv

Trustee as used under
Bkcy Act 5—Wh E
Bkcy not a person liability at
time of bkcy — affirmed
Demurrer ground ga not Claim
Ca - Not found liability at
time of Bkcy.
Benton says claim Misconcepti
— not Ca as stated. — Claim was
Mtge Ca - secured - Atty fees -
Hallis S Dillon

Problem is distribution
Bk't est. atty fees not
due when Trustee went
to sell - If owed Bk would
have gotten the debt in
cash - But, if he was
maker, then he could
add 10% to his claim.

See over p. 9

Exception by Maker

(33,114)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 662

SECURITY MORTGAGE COMPANY, PETITIONER,

vs.

CHARLES A. POWERS, TRUSTEE IN BANKRUPTCY FOR FLORIDA FURNITURE CORPORATION, BANKRUPT

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Judd & Detweiler (Inc.), Printers, Washington, D. C., February 20, 1928

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[fols. a & b-d] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 11686. In Bankruptcy

In the Matter of Florida Furniture Company, Bankrupt

Petition for Receiver

To the Honorable Samuel H. Sibley, United States Judge:

The petition of C. F. Baum Company, Chicago, Ill., Fulton Supply Company, Atlanta, Ga., Atlanta Linen Supply Company, Atlanta, Ga. and Freitag Advertising Agency, Atlanta, Ga., respectfully shows:

1

Petitioners show that the above named Florida Furniture Company is a corporation of the State of Florida having an office and place of doing business in Jacksonville, Fla.; that its president, George W. Hanson, resides in Atlanta, Ga., and it has a factory for the manufacture of furniture in the plant of the Hanson Motor Company on the Central of Georgia Railroad Company, just off Lee Street on the road to East Point, just outside the City of Atlanta; that it has assets consisting of raw material and manufactured products as well as goods partially finished of the value of about $50,000.00.

[fol. 2] 2

That the said Florida Furniture Company was at Jacksonville in the Southern District of Florida on the 7th day of January, 1926, adjudicated a bankrupt upon a voluntary petition of the said corporation, a certified copy of the petition and of the order adjudicating said corporation a bankrupt being hereto attached marked Exhibit "A" and made a part of this petition.

3

Your petitioners are unsecured creditors of the above named Florida corporation having provable claims as follows:

C. F. Baum Company, Chicago, Ill.	$185.00
Fulton Supply Company, Atlanta, Ga.	538.99
Atlanta Linen Supply Company, Atlanta, Ga.	5.50
Freitag Advertising Agency, Atlanta, Ga.	430.00

4

Petitioners show that it is absolutely necessary that a receiver be appointed in this jurisdiction to take charge of the assets located in this county, for the purpose of preserving and protecting the same for the benefit of creditors, pending the issue of the bankruptcy proceedings; that said property is without fire insurance and without protection and the same is liable to be moved away or concealed and that it would be for the best interest of all parties con- [fol. 3] cerned that a receiver be appointed by this Honorable Court to take charge of all the assets of the said bankrupt and preserve and protect the same by way of insurance and otherwise for the benefit of creditors.

Wherefore, your petitioners pray that a receiver be appointed to take charge of all the assets and property of every kind of the said alleged bankrupt, and that the receiver be authorized to take such steps as may be necessary to properly protect and preserve same pending the election of a trustee.

C. F. Baum Company, Fulton Supply Company, Atlanta Linen Supply Company, Freitag Advertising Agency, by Clarence H. Calhoun, Their Attorney.

Duly sworn to by Clarence H. Calhoun. Jurat omitted in printing.

[fol. 4] EXHIBIT "A" TO PETITION

Debtor's Petition

Certified Copy Voluntary Petition in Bankruptcy from Southern District of Florida

To the Honorable the Judges of the District Court of the United States for the Southern District of Florida.

The petition of: Florida Furniture Corporation, a corporation under the laws of the state of Florida and having its principal place of business within the Southern District of Florida, to-wit: In Duval County, Florida, and District of the State of Florida, Manufacturer.

Respectfully represents: That it has had its principal place of business at Jacksonville, Duval County, Florida, for the greater portion of six months next immediately preceding the filing of this petition at Jacksonville, Florida, within said Judicial District; that it owes debts which it is unable to pay in full; that it is willing to surrender all its property for the benefit of its creditors except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to Bankruptcy.

That the schedule hereto, annexed, marked A (1, 2, 3, 4, 5) and verified by your petitioner's oath, contains a full and true statement of all its debts, and (so far as it is possible to ascertain) the names and places of residence of its creditors and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B (1, 2, 3, 4, 5, 6) and verified by your petitioner's oath contains an ac- [fol. 5] curate inventory of all its property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioner prays, that it may be adjudged by the Court to be a bankrupt within the purview of said acts.

Florida Furniture Corporation, by G. W. Hanson, its President, Petitioner. Damon G. Yerkes, Attorney for Petitioner.

United States of America,
Southern District of Florida,
County of Duval, ss:

I, George W. Hanson, president of Florida Furniture Corporation, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.
(Signed) G. W. Hanson, Petitioner.

Subscribed and sworn to before me, this 7th day of January, A. D. 1926. Cecile V. Wysong, Notary Public, State of Florida at Large. My com. expires Aug. 9, 1926. (Seal.)

[fol. 6] United States District Court, Southern District of Florida

In Bankruptcy. Case No. 2953

In the Matter of Florida Furniture Corporation a Corporation

Adjudication

At Jacksonville, in said District, on the 7th day of January, A. D. 1926, before the Honorable Rhydon M. Call, the Judge of said Court in Bankruptcy, the petition of Florida Furniture Corporation, a corporation that Florida Furniture Corporation, a corporation, be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Florida Furniture Corporation, a corporation is hereby declared and adjudged bankrupt accordingly.

Done and ordered at Jacksonville, in said District, this 8th day of January, A. D. 1926.

Rhydon M. Call, U. S. District Judge.
Attest: A true copy. Edwin R. Williams, Clerk, by
Geo. T. Kilner, Chief Deputy. (Seal.)

[fol. 7] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

I, Edwin R. Williams, Clerk of the United States District Court, in and for the Southern District of Florida, and as such the legal custodian of the files and records of said Court, do hereby certify, that the foregoing two pages of typewritten matter constitute true copies of the Voluntary Petition in Bankruptcy, and Adjudication, omitting schedules and resolution of the board of directors, directing the President to file said petition, of the Florida Furniture Corporation, a corporation, as the same appears among the files and records of this Court.

Witness: my hand and the official seal of said Court, this the 9th day of January A. D. 1926.

Edwin R. Williams, Clerk, United States District Court for the Southern District of Florida, by Geo. T. Kilners, Chief Deputy Clerk. (Seal.)

IN UNITED STATES DISTRICT COURT

ORDER APPOINTING RECEIVER—Filed January 11, 1926

Read and considered. It is ordered that R. A. Burnett be and he is hereby appointed receiver, and is directed to take charge of the assets of the said Florida Furniture Company, bankrupt, protect the same by insurance and otherwise, take an inventory, collect in the outstanding ac-[fol. 8] counts, and hold said assets subject to the further order of the Court. Let him file with the Clerk of this Court, as provided by statute, bond in the sum of $5,000.00.

Dated this 11 day of January, 1926.

Sam'l H. Sibley, United States Judge.

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

In the Matter of FLORIDA FURNITURE CORPORATION, Bankrupt

ORDER POSTPONING SALE OF PROPERTY AND ORDER OF REFEREE THEREON—Filed June 29, 1926

It having been made to appear to the Court that an application has been made by Charles A. Powers, Trustee in bankruptcy in this matter, to the United States District Court in and for the Northern District of the State of Georgia, for a sale of certain assets of the Florida Furniture Corporation, bankrupt, and that this application has been made to the said Court in the Northern District of Georgia since the filing of a petition by Hanson Motor Company to vacate the adjudication in this cause.

It is thereupon ordered and decreed that the Trustee in bankruptcy in this matter make no application to the Court in the Northern District of the State of Georgia, or elsewhere, for the sale of any of the assets of Florida Furniture Corporation, nor to proceed further under any application that may have been made or any order obtained thereunder, until the further order of this Court.

[fol. 9] Done and ordered at Jacksonville, Florida, this 6th day of April, A. D. 1926.

Rhydon M. Call, Judge.

UNITED STATES OF AMERICA,
Southern District of Florida:

I, Edwin R. Williams, Clerk of the United States District Court, in and for the Southern District of Florida, do hereby certify the foregoing to be a true and correct copy of an order made and entered in said Court on the 6th day of April, 1926, as the same appears of record and file in said Court.

Witness my hand and the official seal of said Court this the 6th day of April, 1926.

Edwin R. Williams, Clerk U. S. District Court, Southern District of Florida. (Seal.)

The foregoing certified copy of the order of the District Court of the U. S. for the Southern District of Florida having been filed in this case it is ordered that the trustee's petition to sell be postponed until the further order of this Court.

April 7th, 1926.

Harry Dodd, Referee.

[fol. 10] IN UNITED STATES DISTRICT COURT

PETITION TO SELL REAL ESTATE AND ORDER OF REFEREE THEREON

To the Honorable Harry Dodd, Referee in said case:

Now comes Charles A. Powers, trustee in bankruptcy of the above named bankrupt, and respectfully shows:

1

That petitioner is the duly elected trustee, qualified and acting as such in the United States District Court, for the Southern District of Florida, the Court of original jurisdiction in said case, and that R. A. Burnett, of Atlanta, Georgia, is assistant and associate trustee in said case, made so on the application of your petitioner and by an order of Honorable Samuel H. Sibley, judge of the United States District Court, for the Northern District of Georgia, at Atlanta, Georgia.

2

That petitioner, as trustee, is in possession of and has the custody and control of and title to the following real estate consisting of improved property known as the plant, building, office, and vacant real property of the Florida Furniture Corporation formerly known as the property of Hanson Motor Company, at Atlanta, Georgia, and more particularly described as follows:

All that tract or body of land lying and being in Land Lot No. 119, of the 14th District of Fulton County, Georgia, being improved property and having thereon improvements

and beginning at the intersection of the West side of Sylvan [fol. 11] Road formerly Ashby Street, and the Southeast side of Murphy Avenue, said Southeast side being ninety-four (94) feet from and parallel to the center line of the Atlanta & West Point Railroad track; thence Southwesterly along the Southeast side of Murphy Avenue, four hundred, thirty-three and three-tenths (433.3) feet; thence Southeasterly at right angles to Murphy Avenue two hundred thirty-four (234) feet; thence Southwesterly nineteen (19) feet more or less to a point eight (8) feet Northeasterly from the center line of a spur track serving the warehouse of A. P. Morgan Grain Company on the Northeast side of thereof; thence Southeasterly parallel with said center line twelve (12) feet; thence Southwesterly along a line which is parallel to and forty (40) feet from the Southeast building line of said warehouse one hundred twenty-six (126) feet, more or less, to a point which is eight (8) feet from measured Northeasterly at right angles to the center line of a spur track serving said warehouse on the Southerly at right angles to the center line of a spur track serving the warehouse on the Southwest side thereof; thence Southeasterly parallel with said center line and eight (8) feet therefrom, sixty-five (65) feet, more or less, to a point which is twenty-five (25) feet from measured Northerly at right angles to the center line of the Atlanta & West Point Belt line main track; thence Southeasterly parallel with the center line of said main track, one hundred seventy (170) feet, more or less, to Sylvan Road thence seven hundred four tenths (704.4) feet, more or less, to the point of beginning, with the free use, right and liberty of a thirty (30) foot road known as Murphy Avenue paralleling the Central of Georgia Railway right of way and lying between it and the property above described. Also, a private road twenty (20) feet wide lying between the property above described and the property of A. P. Morgan Grain Company ware- [fol. 12] house, but reserving from above land the use of the Atlanta & West Point Railroad of a right of way sixteen (16) feet in width lying eight (8) feet on each side and parallel with and adjacent to the center line of a spur track serving the above mentioned warehouse on the Northeast side thereof.

3

The above is the property conveyed to the bankrupt corporation by Hanson Motor Company by a deed.

4

Petitioner shows that the same is the property conveyed by the bankrupt to Security Mortgage Company of Atlanta, Georgia, February 24th, 1925, to secure a loan by the said Security Mortgage Company to the Hanson Motor Company of said deed and in the sum of $90,000.00 principal, besides ten (10) interest notes of $3,150.00 each principal, and due February 24th and August 24th, each year from February 24th, 1925, and bearing interest from maturity at 8%. The property above described and conveyed to secure said loan of $90,000.00 besides interest as set out, to Security Mortgage Company, has by them under date of February 25th, 1925, been sold and transferred to Citizens & Southern Bank as trustee, which said Citizens & Southern Bank, as trustee, holds the record title to all the property described to secure payment of the loan of $90,000.00 and the interest as set out.

5

Your petitioner shows that R. O. Campbell Coal Company of Atlanta, Georgia, on January 23rd, 1926, filed its [fol. 13] notice of a lien for material furnished for the improvement of said property but fails to set out the amount of said lien, said lien being recorded in Book 622, Page 249, Fulton County records.

6

Petitioner shows to the Court that taxes due the State and County for the year of 1925 are due and unpaid and is a lien on the property in the sum of $1,282.50.

7

Your petitioner shows that said property is expensive to retain, it being necessary to employ night and day watch-

men, two (2) in number, at an expense of $36.00 per week, besides furnishing light and fuel as well as a large water supply for sprinkler system and to pay approximately $40.00 per month fire insurance premium as well as $24.50 watchmen fire alarm service or an aggregate of more than $200.00 per month actual preservation costs.

8

That interest on the loan for which the property is pledged as security is $6,250.00 per year, being more than $500.00 per month and your petitioner represents that the probable actual cost of keeping the said property is $750.00 per month, making the same exceedingly expensive to the bankrupt estate.

9

Your petitioner shows that the corporation was adjudicated a bankrupt on its own petition asking adjudication [fol. 14] and that thereafter some of the stockholders of said company filed a motion at Jacksonville, Florida, through Underwood, Pomeroy and Haas, Attorneys, Atlanta, Georgia, seeking to set aside the adjudication but that said motion was set down at a date far distant from the date of filing, namely, February 22nd, 1926, and that the same has been continued to an indefinite date and no immediate hearing on said motion is anticipated or is possible, and that the estate in the meantime is being held intact at a great loss to the unsecured creditors of said estate.

10

Petitioner represents that it is necessary and extremely beneficial to the estate that immediate steps to sell the property, realty, of the corporation, be taken and petitioner brings this application for leave to sell as early as possible.

Wherefore, petitioner prays that the Court pass a proper order, looking to the immediate sale of said property either free from liens or subject to the lien of Security Mortgage Company which has been transferred to the Citizens & Southern Bank of Atlanta, Georgia, as trustee.

Clarence H. Calhoun, D. J. Lewis, Attorneys for Trustee.

Duly sworn to by Charles A. Powers. Jurat omitted in printing.

[fol. 15] Sworn and subscribed to before me, this 11th day of March, 1926. R. H. Crawford, Notary Public, State at Large, Fla. Com. Ex. May 14, 1926. (Notarial Seal.)

Order

The foregoing application of the trustee in bankruptcy of the above named estate to sell real property of the bankrupt corporation, presented, read and considered. It is ordered, that a copy of said application and this order be served on the applicants for an order setting aside the adjudication by serving the attorneys of record for said applicants, also, that a copy of this application and order of the trustee be served on Citizens & Southern Bank, as trustee, Atlanta, Georgia, and Security Mortgage Company, Atlanta, Georgia, by serving a proper officer of each of said corporations, as well as a copy of said petition to be served on R. O. Campbell Coal Company, Atlanta, Georgia, and let them show cause before this Court on the 17 day of March, 1926, at 10 o'clock A. M., why the application to sell the real property as described should not be granted.

Dated this 12 day of March, 1926.

Harry Dodd, Referee in Bankruptcy. (Seal.)

State of Georgia,
County of Fulton:

Personally appeared before me, W. T. McKnight, who being duly sworn deposes and says that he served the within petition on parties thereto by serving Underwood, Pomeroy & Haas by handing a copy of the same to Mr. [fol. 16] Marvin Underwood, of said firm; by handing a copy of the same to W. D. Thompson, attorney for Security Mortgage Company; by handing a copy of same to Geo. T. David, assistant cashier Citizens & Southern Bank, Atlanta, Georgia. That all of said services were in person and to the parties named.

W. T. McKnight.

Sworn and subscribed to before me, this 13th day of March, 1926. H. W. Finch, Notary Public, State at Large, Ga.

STATE OF GEORGIA,
County of Fulton:

Personally appeared before me John McElroy, who on oath says that he served R. O. Campbell Coal Company with the within petition and order by handing a copy of the same to James L. Gerideau, secretary-treasurer of R. O. Campbell Coal Company.

Dated this 13th day of March, 1926.

John McElroy.

Sworn and subscribed to before me, this 13 day of March, 1926. H W. Finch, Notary Public, State at Large, Ga.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFEREE AUTHORIZING SALE OF CERTAIN PROPERTY

The trustee having renewed his petition for leave to sell the real estate in the above stated casa, and having represented that the order of the District Judge for the Southern District of Florida, heretofore granted restraining the trustee from proceeding, has been dissolved and an order passed by said Court directing the trustee to proceed with the disposition of the assets of the bankrupt corporation as he may be authorized and directed by orders of the Court:

Now, therefore, it is ordered that the trustee be and he is hereby authorized and directed to advertise all of the real estate and improvements thereon for sale to be had on the 28th day of May, 1926, at 10:00 o'clock a. m., in the office of the undersigned referee.

The trustee is authorized at said time and place to offer said property; first, free from all liens, especially free from

the lien claimed by the Security Mortgage Co. preserving the rights of the Security Mortgage Co. to claim the proceeds of said sale in the hands of the trustee; and second, if no satisfactory offer is received therefore, then the trustee may offer said property for sale subject to all liens including the lien held by the Security Mortgage Co., and report to this Court for confirmation the highest and best and most acceptable bid obtained for said property.

[fol. 18] Let said property be duly appraised as required by law and notice to creditors be given.

This the 14th day of May, 1926.

Harry Dodd, Referee.

In United States District Court

Orders Adjourning Hearing

On motion of counsel for creditors seeking to set aside the adjudication of bankruptcy in the Court of original jurisdiction the hearing on the foregoing rule is adjourned to March 19th, 1926, at 10 A. M.

This March 17, 1926.

Harry Dodd, Referee.

On motion of counsel for creditors seeking to vacate the adjudication in the Court of original jurisdiction the hearing on this rule is adjourned to March 30th, 1926, at 10 A. M.

March 19th, 1926.

Harry Dodd, Referee.

Hearing on petition again adjourned to April 7th, 1926, at 12 M.

March 30/26.

Harry Dodd, Referee.

Filed in Clerk's office, 1:30 P. M., June 29, 1926.

[fol. 19] IN UNITED STATES DISTRICT COURT

PETITION AND ORDER PROVIDING MANNER AND TIME OF SALES OF REALTY—Filed June 29, 1926

To the Honorable Harry Dodd, Referee:

Now comes Chas. A. Powers, trustee, through his attorney of record, and shows:

1

That on May 28th, the date set for a sale of the assets of the above corporation, that your petitioner did not at that time receive satisfactory bids for the real estate and buildings of the bankrupt corporation but that subsequently more than one offer has been proposed as a sale price for the property and that the property should be sold as early as possible.

2

That reasons for such sale have heretofore been advanced to the Court in your petitioner's original application for an order of sale all of which are confirmed herein.

Wherefore, petitioner brings this application into Court to provide manner and time of sale of the realty.

Dillon, Calhoun & Dillon, Attorney for Trustee.

[fol. 20] *Duly sworn to by Clarence H. Calhoun. Jurat omitted in printing.*

It is ordered that the trustee sell the real estate in question particularly described by metes and bounds in the former petition for leave to sell of file herein, free from all liens, in the office of the undersigned Referee, 325 Grant Bldg., Atlanta, Ga., on June 12th, 1926, at 11 A. M. at auction to the highest bidder and best bidder subject to confirmation. The rights of all lien creditors preserved in the proceeds. Let notice be given creditors as required by law.

This June 2nd, 1926.

Harry Dodd, Referee.

[fol. 21] IN UNITED STATES DISTRICT COURT

REPORT OF TRUSTEE ON SALE OF REAL ESTATE

To the Honorable Harry Dodd, Referee:

Now comes Charles A. Powers, trustee by and through his attorney, and shows:

1

That pursuant to an order of sale heretofore made in this case, the real property of the bankrupt, consisting of plant and equipment attached thereto and known as the Hanson Motor Company plant, was offered for sale before this Court on the 12th day of June, 1926, and adjourned to the 14th day of June, 1926, at 11 o'clock A. M. That said property was offered for sale free of any liens, including the lien of taxes.

2

Your petitioner shows that Security Mortgage Company, of Atlanta, claims a lien under a mortgage deed between itself and Hanson Motor Company, predecessors of Florida Furniture Corporation, for approximately $104,700.00, and that there are State and County taxes due on said property for the years of 1925 and 1926 in a sum approximately $5,800.00, making a total of liens claimed against the property of $110,500.00.

3

Your petitioner shows that two bidders were present, making two bids each, the highest of which was that of Security Mortgage Company in the sum of $112,500.00 which bid was for the entire property, free of all liens.

[fol. 22]

4

Your petitioner shows that said property has been in his hands, care and maintenance for more than five months but for the greater part of this time, to-wit, up to and including May 12th, 1926, the property was withheld from sale by order of Court on application of Hanson Motor Company, and that on May 12th, 1926, your petitioner was

directed, by the Court, to proceed with a sale and that promptly the property was advertised for sale and diligent effort has been made to find a proper customer but that this property is large and expensive and in the time allotted to petitioner, he has been unable to procure a satisfactory offer for the property.

5

Your petitioner shows that the bid of $112,500.00 made by Security Mortgage Company, while the best offer at this time, is not an adequate price for said property and does not represent 75 per cent of the appraised value of said property, neither is it sufficient to pay the expenses necessary to preserve and protect the property, prepare and provide for a sale of the same, including costs of administration, and at the same time pay the alleged amount of liens claimed.

6

Your petitioner shows that the Security Mortgage Company was, by an order of this Court, served with a copy of the petition and order of sale selling said property free of liens and by order of Court has been made a party to this order of sale, that said Security Mortgage Company has not presented its claim or lien for adjudication on this Court.

[fol. 23] Wherefore, petitioner prays leave to file this report of proceedings had in the matter of a sale of the property set out herein for such action as the Court may deem proper.

Clarence H. Calhoun, Attorney for Charles A. Powers, Trustee.

In United States District Court

Petition of Security Mortgage Company for Confirmation of Sale

To the Honorable Harry Dodd, Referee in Bankruptcy:

The petition of Security Mortgage Company respectfully shows:

1

That on the 14th day of May, 1926, an order was passed by this Court, directing the Trustee to advertise all of the real estate and improvements thereon of the above named bankrupt for sale to be had on the 28th day of May, 1926, at ten o'clock A. M., in the office of the Referee.

2

That pursuant to said order, said real estate was offered for sale in the office of the Referee on the 28th day of May, the Trustee being present thereat. Your petitioner bid the amount of a debt due it by the Hanson Motor Company which has been assumed by the bankrupt as a part of the consideration of the purchase of said real estate. No other bids having been made the Referee adjourned said sale until June 12th at eleven o'clock, at which time no further bids having been received, the Trustee was so notified and the sale again was postponed until eleven o'clock June 14th, [fol. 24] at which time the real estate scheduled in said cause was put up and, after several bids were made by several parties, same was knocked down to petitioner at and for the sum of $112,500.00, the same being the highest and best bid made at said sale.

3

That the land and improvements referred to herein is that tract of land situated in Fulton County, Georgia, at the southwest corner of Sylvan Road and Murphy Avenue, fronting four hundred thirty-three and three-tenths (433.3) feet on Murphy Avenue and fronting seven hundred and four-tenths (700.4) feet, more or less, on Sylvan Road, being improved property and having thereon buildings used by the Hanson Motor Company in the manufacture of automobiles and later by the Florida Furniture Company in the manufacture of furniture. For a more particular description see loan deed executed by the Hanson Motor Company to petitioner, under date of February 24th, 1925, recorded on the 25th day of February, 1925, in Book 907, Page 65, of the records of the Clerk of the Superior Court of Fulton County, Georgia.

4

Your petitioner shows that it verily believes that a larger sum than is above stated cannot be obtained as the sale was largely attended and fairly conducted and that petitioner's debt bears interest at the rate of 7% per annum and is rapidly increasing and if said sale is not confirmed to it, interest charges and expenses attendant upon keeping said property insured and preserved for a longer time would be considerable and having been offered for sale three times and unlikely to produce better results, your petitioner verily believes that the sale should be confirmed.

[fol. 25] 5

Petitioner further shows that the Trustee having diligently attempted to sell said property and having so far failed to obtain a better or higher bid than that of petitioner and that petitioner's debt being a priority over and above that of other creditors, the sale as had on the 14th day of June should be confirmed or the Trustee should be directed to relinquish any claim of the bankrupt in said land, the bankrupt having failed to carry out the conditions of the deed under which it holds and under which the Trustee is now in possession, said deed having been executed and delivered subject to all the terms and conditions of the loan deed of the Hanson Motor Company to your petitioner described above.

6

Petitioner shows that the amount of the debt owing under and by virtue of the terms of said loan deed is as follows: a verdict and a judgment based thereon rendered on the 4th day of May, 1926, and recorded in General Execution Docket 42, Page 126, in the records of the Clerk of the Superior Court of Fulton County, Georgia, said judgment having been declared by the City Court of Atlanta to be a special lien upon the land hereinabove referred to. Said judgment amounts to principal $93,150.00, interest to date of judgment, May 4th, 1926, $1,274.00 and interest thereon from date of judgment at the rate of 8% per annum to date of payment, attorney's fees $9,442.00, costs of Court $15.85.

In addition thereto, your petitioner is the holder of a certain tax fi. fa. issued by the State of Georgia and County of Fulton for State and County taxes for the year, 1925, against the Hanson Motor Company, which is a lien on the land above described amounting, on the date of the [fol. 26] transfer by the Tax Collector, to $1,284.30, as of the 5th day of April, 1926, besides interest on said sum at the rate of 7% per annum from said date. Said tax fi. fa. having been entered on General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia. It is also the holder of a certain tax fi. fa. issued by the City of Atlanta for city taxes for the year, 1925, against the Hanson Motor Company, which is a lien on the land above described amounting, on the date of the transfer by the Tax Collector, to $1759.50, as of the 5th day of April, 1926, besides interest on said sum at the rate of 7% per annum from said date. Said tax fi. fa. having been entered on General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia.

7

Petitioner further shows that under and by virtue of the laws of the State of Georgia and ordinances of the City of Atlanta a lien for taxes for the year, 1926, is in existence and has existed against said land since the first and thirty-first days of January, respectively.

8

That said land was offered for sale pursuant to said order free and clear of all liens.

Wherefore, petitioner prays that an order be passed confirming said sale and authorizing and directing the Trustee to deliver good and sufficient deed and possession of said real estate and improvements thereon to your petitioner upon payment of the amount bid by it at said sale, it being the highest and best bidder thereat, and that your peti- [fol. 27] tioner be allowed a reasonable time, not less than ten days, for the purpose of examining the titles to said land in order to ascertain the existence of any other liens

or defects in said title in order that the Trustee might have a reasonable time within which to cure said defects, if possible, and should said examination of title disclose any defect that would prevent the Trustee from delivering to petitioner a good and marketable title, petitioner be released from any obligation incurred by reason of having made said bid.

Security Mortgage Co., by Asa W. Candler, Secy.

Duly sworn to by Asa W. Candler. Jurat omitted in printing.

[fol. 28] In United States District Court

Order of Referee Confirming Sale of Real Estate—Filed June 29, 1926

The Trustee in the above stated case having made a report of the sale of the real estate belonging to the estate of said bankrupt, and the successful bidder, the Security Mortgage Co., having likewise filed a report of said sale, and the Trustee having made his report praying for such action as the Court may deem proper, and the Security Mortgage Co., praying for a confirmation of said sale,

Now at the time and place fixed for hearing the application for confirmation, it is ordered as follows:

It appearing that the Security Mortgage Co., was the highest and best bidder at the sale of the real estate scheduled in the petition of the above named bankrupt and located in Atlanta, Fulton County, Georgia, being a certain tract of land in Land Lot No. 119 of the 14th District of said County, at the Southwest corner of Sylvan Road and Murphy Avenue, fronting four hundred thirty-three and three-tenths (433.3) feet on Murphy Avenue and fronting seven hundred and four-tenths (700.4) feet, more or less, on Sylvan Road, as more fully described in a loan deed from Hanson Motor Company to Security Mortgage Company, dated February 24, 1925, recorded on the — day of February, 1925, in Book 907, page 65, of the records of the Clerk of the Superior Court of Fulton County, Georgia, and notice of the proposed sale having been given thereon, as

provided by law, no objections having been made to said sale, the same having taken place and said land having been sold to Security Mortgage Company of the City of Atlanta, State of Georgia, in said District, for $112,500.00, free of all liens, now coming on for confirmation as provided in such notice, and the attorney for the Trustee herein being present,

[fol. 29] It is ordered that such sale be and the same is hereby confirmed and that the Trustee herein, on receipt of the consideration in cash, complete the same by executing proper deed or deeds transferring to said purchaser all his right, title and interest in and to said property and delivering the same to said purchaser free of all liens including lien of taxes for 1926.

It is further ordered that the purchaser have a reasonable time, not less than ten days, for the purpose of examining the titles to said land in order to ascertain the existence of any other liens or defects in said title in order that the Trustee might have a reasonable time within which to cure said defects, if possible, and should said examination of title disclose any defect that would prevent the Trustee from delivering to petitioner a good and marketable title, that said petitioner be released from any obligation incurred by reason of having made said bid.

It is further ordered that the purchaser herein be allowed to perform the conditions of its said bid in part by giving credit on its secured debt for the amount of said secured debt as the same may be allowed including the claim for taxes held by the purchaser for the year 1925.

It is further ordered that it may further comply with its bid by assuming and agreeing to pay off taxes, both State and County and City, on said property for the year 1926, amounting in the aggregate to $2,880.60, and by paying in cash into Court the balance of its said bid of $112,500.00. It is agreed in open Court and so ordered that the lien of the petitioner attaches to the proceeds of the sale and that settlement with the trustee may be had by the cancellation of the lawful liens by the purchaser against said property without the necessity of actually paying the whole amount [fol. 30] in cash. It is provided, however, that the amount of said lien is not adjudicated by this order.

This the 15th day of June, 1926.

Harry Dodd, Referee.

In United States District Court

Petition of Security Mortgage Company Relative to Liens and Order Thereon—Filed June 29, 1926

Now comes the Security Mortgage Company and shows to the Court the following facts:

1

That it is the holder of a just and valid lien against the property of the above named bankrupt, having a priority over any other debts against said property.

2

That said lien exists by reason of:

(1) The transfer to it by T. C. Richardson, Tax Collector and Ex Officio Sheriff of the State of Georgia and County of Fulton, of a certain tax fi. fa. issued by the State of Georgia and County of Fulton against the Hanson Motor Company for State and County taxes for the year 1925. That Security Mortgage Company, on April 5th, 1926, paid to said Richardson the sum of $1,284.30 and said fi. fa. was duly transferred to petitioner and entered [fol. 31] on the General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia.

(2) The transfer to it by W. E. Harwell, Marshal of the City of Atlanta, of a certain fi. fa. issued by the City of Atlanta against the Hanson Motor Company for city taxes for the year 1925. That Security Mortgage Company, on April 5th, 1926, paid to said Harwell the sum of $1,759.50 and said fi. fa. was duly transferred to petitioner and entered on the General Execution Docket No. 42, Page 84, in the office of the Clerk of the Superior Court of Fulton County, Georgia.

(3) That on the 24th day of February, 1925, the Hanson Motor Company executed a certain promissory note wherein it agreed to pay to the order of Security Mortgage Company the sum of $80,000.00 in five years from date, as

per copy of said note hereto attached and marked "Exhibit A." Said Hanson Motor Company at the same time executed ten interest coupons for $3,150.00, being for semi-annual interest of said principal sum of $90,000.00 at the rate of seven per cent per annum, as per copy of one of said interest coupons hereto attached and marked "Exhibit B."

(4) Said Hanson Motor Company having failed to comply with the terms of said note by failing to pay the interest coupon due on the 24th day of February, 1926, petitioner, on the 1st day of April, 1926, exercised its option to declare the principal note of $90,000.00 due and collectible, in accordance with the terms of said note.

(5) That on February 24, 1925, said Hanson Motor Company executed and delivered to petitioner, for the purpose [fol. 32] of securing payment of said note and the interest thereon, a loan deed conveying to said Security Mortgage Company a fee simple title to the land described in schedules of the above named bankrupt and in the application of the Trustee for an order to sell the same, said land being briefly described as being situate, lying and being in the County of Fulton on Land Lot 119 of the 14th District thereof and at the southwest corner of Sylvan Road and Murphy Avenue, fronting four hundred thirty-three and three-tenths (433.3) feet on Murphy Avenue and fronting seven hundred and four-tenths (700.4) feet, more or less, on Sylvan Road, being improved property and having thereon buildings used by the Hanson Motor Company in the manufacture of automobiles and later by the Florida Furniture Company in the manufacture of furniture.

(6) Said note and the interest coupons and the loan deed securing the same provide for the payment of ten per cent of the principal and interest due, if collected by law or through an attorney at law, and that having complied with all of the statutes of the State of Georgia with reference to the collection of attorney's fees in contracts providing therefor, petitioner filed suit to the City Court of Atlanta on said note, wherein it prayed for a judgment for principal, interest, attorneys' fees and costs of Court and that said amounts be declared a special lien upon the

land described in said loan deed and briefly described herein.

(7) That thereafter, to wit, on the 4th day of May, 1926, said case coming on to be heard, a verdict in favor of your petitioner was rendered for the principal sum of $93,150.00 and the sum of $1,274.00 interest to May 4, 1926, $9,442.00 at attorney's fees, and $15.85 costs of Court, and that Security Mortgage Company had a special lien upon the land [fol. 33] hereinabove referred to, whereupon, on the same date, a judgment in conformity with said verdict was rendered by said Court and entered upon the minutes thereof, wherein it was ordered that the plaintiff, Security Mortgage Company, have and recover of the defendant, Hanson Motor Company, the principal sum of $93,150.00 and the sum of $1,374.00 interest to date of judgment and future interest thereon in accordance with the terms of said note at the rate of 8 per cent per annum, $9,442.00 attorneys fees, $15.85 costs of court, and it was further ordered by the Court that an execution issue pursuant to the terms of the verdict and judgment and that said execution was adjudged to be a special lien upon the land described hereinabove.

(8) Pursuant to said judgment, an execution was issued and duly recorded on General Execution Docket No. 42, Page 126, of the records in the office of the Clerk of the Superior Court of Fulton County, Georgia.

(9) That subsequent to the execution, delivery and recording of the loan deed from Hanson Motor Company to Security Mortgage Company, above referred to, said Hanson Motor Company conveyed said land to the bankrupt, subject to all the terms and conditions of the notes and the loan deed from said Hanson Motor Company to Security Mortgage Company and said bankrupt, nor the Hanson Motor Company, have paid any part of said debts and there are no just set offs against the same.

Wherefore, petitioner prays that an order be passed by this Honorable Court declaring petitioner's liens to be prior liens upon the land or any funds derived from the sale of said lands in said Court as follows:

[fol. 34] By reason of State and County tax fi. fa. against Hanson Motor Company for the year, 1925, duly transferred to Security Mortgage Company, in the sum of	$1,284.30
Interest at the rate of 7% per annum from April 5th, 1926	
City tax fi. fa. against Hanson Motor Company for the year, 1925, duly transferred to Security Mortgage Company, in the sum of	1,759.50
Interest at the rate of 7% per annum from April 5th, 1926	
Judgment against Hanson Motor Company, Principal	93,150.00
Interest to May 4th, 1926	1,274.00
Interest from May 4th, 1926, at 8% per annum	
Attorney's fees	9,442.40
Costs of Court	15.85

and that said amount be allowed as a credit on the bid of Security Mortgage Co. it having been the highest and best bidder at the sale of said land by this honorable Court.

Candler, Thomson & Hirsch, Attorneys for Security Mortgage Company.

Duly sworn to by Asa W. Candler. Jurat omitted in printing.

[fol. 35] EXHIBIT A TO PETITION

$90,000.00. Atlanta, Ga., February 24, 1925.

February 24th, 1930, — months after date I promise to pay to the order of Security Mortgage Company, Ninety thousand and 00/100 Dollars, in gold coin of the United States or its equivalent for value received.

With interest after maturity until paid at eight per cent per annum with all costs of collection, including ten per cent as attorney's fees, if collected by law or through an attorney at law. Each of us, whether principal, security, guarantor, indorser, or other party hereto, hereby severally

waive and renounces each for himself and family, any and all homestead rights, either of us or the family of either of us, may have under or by virtue of the constitution or laws of Georgia, any other state, or the United States, as against this debt or any renewal thereof; and each further waives demand, protest and notice of demand, protest and non payment. It is also expressly agreed and understood, if this note, or any part thereof, is not paid when due that all other notes outstanding, bearing even date with these pres- [fol. 36] ents, and given for the same intent and purpose as this note, shall, at the option of the holder, become due and collectible—time being of the essence of this contract.

Given under the hand and seal of each party.

Hanson Motor Company, by G. W. Hanson, Prst. (Seal) by John Aldredge, Sect. (Seal.)

Due ——, ——
Address: ——.

EXHIBIT B TO PETITION

$3,150.00 Atlanta, Ga., February 24, 1925

February 24th, 1926, — months after date I promise to pay to the order of Security Mortgage Company, Thirty-one Hundred Fifty and 00/100 Dollars, in gold coin of the United States or its equivalent for value received.

With interest after maturity until paid at eight per cent per annum with all costs of collection, including ten per cent as attorney's fees, if collected by law or through an attorney at law. Each of us, whether principal, security, guarantor, endorser, or other party hereto, hereby severally waives and renounces each for himself and family, any and all homestead rights, either of us or the family of either of us, may have under or by virtue of the constitution or laws of Georgia, any other state, or the United States, as against this debt or any renewal thereof; and each further waives demand, protest and notice of demand, protest and non payment. It is also expressly agreed and understood, if this note, or any part thereof, is not paid when due that all other notes outstanding, bearing even date with these presents, and given for the same intent and purpose as this

[fol. 37] note, shall, at the option of the holder, become due and collectible—time being of the essence of this contract.

Given under the hand and seal of each party.

Hanson Motor Company, by G. W. Hanson, Prest., (Seal), by John Aldredge, Sect. (Seal.)

Interest Coupon No. 2.

Due ——— —, ———.

Address: ———.

This claim is allowed and ordered paid out of the proceeds from the sale of real estate and the objections of the Trustee are over ruled on each and every ground.

June 25th, 1926.

Harry Dodd, Referee.

IN UNITED STATES DISTRICT COURT

OBJECTIONS OF THE TRUSTEE TO THE ALLOWANCE OF THE CLAIM OF SECURITY MORTGAGE COMPANY—Filed June 29, 1926

Now comes Charles A. Powers, trustee for the estate of the above named bankrupt, as respondent, and to the petition of The Security Mortgage Company filed in this Court on the 15th day of June, 1926, setting up a claim of lien to the fund arising from the sale of the real estate, the sale of which was confirmed on the 15th day of June, 1926, respectfully shows:

[fol. 38] As affecting the right of the said Security Mortgage Company to a lien on the funds in question, your trustee shows:

That the Florida Furniture Company was adjudicated a bankrupt upon its voluntary petition in the District Court of the United States for the Southern District of Florida, at Jacksonville, Fla., on the 7th day of January, 1926; that ancillary proceedings were filed in this Court on the 11th day of January, 1926; that, thereafter, in January, 1926, respondent was elected trustee in said Southern District of Florida; that upon a petition of respondent, as trustee, filed in this Court, February 6th, 1926, R. A. Burnett, residing

in this district, was named as associate and assistant to your trustee in this case and the ancillary proceedings, then pending in this Court, were referred to Honorable Harry Dodd, as Referee.

That, thereafter, on the 12th day of March, 1926, upon the written application of respondent, as trustee, seeking to sell the real estate free from the lien of The Security Mortgage Company, an order was entered for the Security Mortgage Company to show cause before this Court on the 17th day of March, 1926, why the application to sell the real estate should not be granted; that a copy of such petition and order to show cause was served upon The Security Mortgage Company on the 13th day of March, 1926; that on the return day of said rule, the motion for an order to sell was continued from time to time as follows: From March 17th, 1926, to March 19th, 1926; from March 19th, 1926, to March 30th, 1926; from March 30th, 1926, to April 7th, 1926; on April 7th, 1926, the rule was postponed and an order of sale was entered on May 14th, 1926, and the final order directing the sale on June 2nd, 1926, all of which will appear more fully of record in the files of this [fol. 39] case; that pursuant to the petition of the trustee and the order to show cause thereon and service of the same upon The Security Mortgage Company, the said Security Mortgage Company, by its counsel, appeared in Court at the various times mentioned when the application for a sale was continued and postponed from time to time because of proceedings pending in Jacksonville to vacate the order of adjudication, but the Security Mortgage Company, at the various times when the question for taking an order of sale was up before the Court, was represented by counsel at the proceedings and at no time made objections to the sale of the property by the trustee free from its liens, it having been directed to make objections, if any it had, by the original show cause order.

That about said date, to wit, February 24th, 1926, an interest note became due, that at the time of bankruptcy and at the time of the appointment of your respondent as trustee, and at the time of bringing the application for the sale of the real estate, the indebtedness due the Security Mortgage Company had not become due, the same having

been declared due on the 1st day of April, 1926; that thereafter about the 13th day of April, 1926, suit was instituted in the City Court of Atlanta upon the notes set out in the petition of Security Mortgage Company and judgment against Hanson Motor Co. was rendered on the 4th day of May, 1926, as alleged in the petition of Security Mortgage Company; that in said judgment, a special lien was set up as against the real estate which was then in this Court for administration and as above set forth, and which property was sold on the 15th day of June, 1926, by this Court; that the loan deed and the notes sued upon were given by the Hanson Motor Company, a corporation of Atlanta, Georgia, but that the bankrupt herein took over the property by a deed from the Hanson Motor Company about the 1st day of July, 1925, in which the bankrupt, in consideration of the [fol. 40] transfer of said real estate, assumed the indebtedness due the Security Mortgage Company; that a copy of the resolution of the bankrupt company, in which the trade between the two companies was consummated, is attached hereto as Exhibit "A"; that the judgment of the City Court of Atlanta is attempting to fix a lien upon the property then in the custody of your petitioner, as trustee, was rendered without notice and as far as your petitioner is concerned, was procured ex parte; that the Hanson Motor Company at the time of entering the judgment in the City Court of Atlanta, was and still is, absolutely insolvent, all of its assets having been transferred to the bankrupt, as aforesaid; that the act of entering the judgment in the City Court of Atlanta was an attempt to increase the amount of the lien in favor of the Security Mortgage Company as against the property in the custody of this Court, by evading the jurisdiction of this Court, and without permitting this Court to pass on and adjudicate such question.

Your trustee objects to the allowance of that part of the claim of the Security Mortgage Company, as set out in its said petition, which seeks to have attorney's fees amounting to $9,442.80 allowed and also objects to the payment of the Court costs incurred in the said proceedings; that Security Mortgage Company should also be taxed with costs of the foreclosure in this Court, including Referee's fees and trustee's fees, costs of preserving the property, attorney's

fees, and such other expenses as are proper in such cases. Your trustee says that the lien, under the loan deed as it existed without a judgment in the City Court of Atlanta, together with interest is a valid lien and should be recognized and paid out of the proceeds brought from the sale of the property; that also, all taxes that have been paid by the Security Mortgage Company should be refunded.

[fol. 41] Your trustee bases his objections to the allowance of the item of $9,442.80, claimed as attorney's fees under the Fi Fa issued out of the City Court of Atlanta, upon the following grounds, to-wit:

1. At the time of fixing the lien on the property in question for the attorney's fees, this Court had exclusive jurisdiction of both the parties and the subject matter; that, inasmuch, as the exclusive jurisdiction was in this Court, the City Court of Atlanta, had no jurisdiction to fix a lien which would affect the property in question, and so the judgment in the City Court of Atlanta, as far as the rights of the parties at interest in this proceeding are concerned, is void.

2. The claim for attorney's fees was not a claim that was "absolutely owing" at the time of bankruptcy as required by Section 63-*a* of the Bankruptcy Act, the claim then being contingent; the judgment, as to attorney's fees, which was obtained after bankruptcy, is not founded upon a provable debt, and the judgment would be stripped of costs and interest accrued after the filing of the petition.

3. The lien sought to be established by the judgment of the City Court of Atlanta, is vitiated by Section 67 of the Bankruptcy Act, under all the facts and circumstances of the case; that the lien for attorney's fees under said judgment was accepted in order to circumvent the effect of the Bankruptcy Act, and so was in contemplation of this Act as specified in said Section 67-*d*; that likewise the lien for attorney's fees is void under said section because liens are to be held valid "to the extent of such present consideration only"; that at the time said lien was attempted to be fastened, the bankrupt was insolvent, and to allow and pay the attorney's fees would work a preference.

[fol. 42] 4. Assuming that the judgment of the City Court of Atlanta established a lien against the property for attor-

ney's fees is valid, and that its validity arises under the terms of the note and loan deed, yet respondent says that such judgment would have a lien under the statute of Georgia only from the date of its rendition and not from the date of the loan deed, and that the judgment in favor of creditors existing as a matter of law under the Bankruptcy Act would, and does antedate the date of the lien of the judgment for attorney's fees, and, therefore, could at most be a judgment junior to the judgment in favor of creditors.

5. The judgment in the City Court of Atlanta, as far as the interests of your respondent, as trustee, are concerned, and the effect it would have upon the property then belonging to him, was ex-parte and your respondent, therefore, is not bound by such judgment, even though a loan deed was being foreclosed which had been given by its predecessor in title.

6. The claim for attorney's fees is without equity to support it; that Security Mortgage Company, at the time of declaring its debt due and at the time of instituting suit and taking judgment, was a party to the proceeding for a foreclosure and sale of this same property in this Court, and all its rights were being fully protected as far as establishing a lien for the indebtedness due and upon the property in question, and the act of taking proceedings in another Court for the purpose of fastening a lien upon the property, in custodia legis, was unnecessary, and done with the purpose of increasing the lien without a corresponding benefit to the estate; that it was recognized by the Security Mortgage Company that its claim for attorney's fees was not a valid claim in this Court, and that the act of taking [fol. 43] the judgment aforesaid was done to circumvent the law and the equitable rights of creditors of this estate.

Walter S. Dillon, Clarence H. Calhoun, Attorneys for Chas. A. Powers, Trustee.

EXHIBIT "A" TO OBJECTIONS

Resolved further, that this corporation purchase from Hanson Motor Company, a corporation of Atlanta, Georgia, all of its real estate located in Georgia, and all of its real

estate located in Duval County, Florida, and all of its personal property, accounts and bills receivable and choses in action, and that this corporation assume and agree to pay all of the present obligations of said Hanson Motor Company whether the same be its direct obligations or obligations against any of its properties, and that this corporation pay for said assets as hereinbefore described by issuing and delivering to said Hanson Motor Company so many shares of the Non-Voting Class A Common Stock as hereinbefore provided for equal to the number of shares the common stock of Hanson Motor Company now outstanding, and which said Hanson Motor Company is now obligated to issue, and by issuing and delivering to said Hanson Motor Company 1250 shares of the Class B Preferred Stock of this Corporation in the form as heretofore approved at this meeting.

The Hanson Motor Company then presented to the corporation deed to the Atlanta properties, which was accepted and deed to the Florida property which was accepted, and said Hanson Motor Company also presented to the corporation a bill of sale and contract transferring to this corporation all of its rights to personal property, [fol. 44] choses in action and interests of every other kind and character and which embodies all the agreements of the parties, which contract was read at the meeting, and the President and the Secretary of the corporation are directed to execute the same on its behalf and affix its seal in duplicate, and to give said Hanson Motor Company a signed copy thereof.

In United States District Court

Petition to Review Referee's Order—Filed June 29, 1926

To Harry Dodd, Esquire, Referee in Bankruptcy:

Your petitioner, Charles A. Powers, respectfully shows:

1

That he is trustee for the estate of the above named bankrupt, duly qualified and acting.

2

That in the course of proceedings, the Security Mortgage Company filed is petition, setting up a claim to the funds arising from the sale of the real estate herein and to which petition, your petitioner herein filed objections to the allowance thereof in the full amount as prayed for; that the objections of your petitioner to the allowance of said claim came on for hearing on the 25th day of June, 1926, at which time an order was entered allowing the claim of the Security Mortgage Company, in full, and over-ruling the objections of your petitioner, which order was in substance as follows:

[fol. 45] "This claim is allowed and ordered paid out of the proceeds from the sale of real estate and the objections of the trustee are over ruled on each and every ground, June 25th, 1926. Harry Dodd, Referee."

3

That such order was, and is, erroneous, in that it was contrary to law and contrary to the evidence, and the Referee should have disallowed the item of attorney's fees amounting to $9,442.00 upon the grounds stated, and your petitioner says that his objections to the allowance of attorney's fees should have been, as a matter of law, sustained, and the attorney's fees disallowed.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and General Order 27.

Dated this — day of June, 1926.

Charles A. Powers, Petitioner, by Dillon, Calhoun & Dillon, His Attorneys.

Duly sworn to by Walter S. Dillon. Jurat omitted in printing.

[fol. 46] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF HARRY DODD, REFEREE—Filed June 29, 1926

To the Hon. Samuel H. Sibley, Judge:

I, the undersigned referee, do hereby certify that in the course of the proceedings in the above stated case the following question arose:

The trustee made application for leave to sell certain real estate free of liens. The first lien creditor holding a claim against the real estate was the Security Mortgage Co. Said claim was for the principal sum of $90,000.00 to which has been added interest and transfers of certain tax fi. fas. The trustee applied in his own name for the order of sale. A rule was issued directing the Security Moregage Co., to show cause why said sale should not be made free of its lien. The Security Mortgage Co., offered no reason. An order of sale was granted by the undersigned referee after several continuances. The continuance of the sale was made in part because, on April 6, 1926, after the application for sale had been made on March 12, 1926, the Hon. Rhydon M. Call, Judge of the District Court of the United States for the Southern District of Florida, the jurisdiction in which said bankruptcy proceedings originated, granted an order, a certified copy of which was filed with the undersigned referee, directing the trustee to make no application to the Court in the Northern District of the State of Georgia or elsewhere for the sale of any of the assets of the Florida Furniture Corp., nor to proceed further under any application that may have been made for such sale. A copy of said order, duly certified by the Clerk of the District Court of the United States for the Southern District of Florida is of file in the record in this case and is transmitted with this certificate.

[fol. 47] Acting upon the information contained in said order, the undersigned referee directed that the trustee's petition to sell be postponed until the further order of this Court. Thereafter, on or about the 14th day of May, 1926, the Honorable Judge of the District Court for the Southern District of Florida issued another order vacating the previous stay order, a copy of said order, not certified, is likewise attached to the record in this case and transmitted with the papers.

On the 14th day of May, 1926, the undersigned referee signed an order directing a sale of the property, free of liens, fixing in said order the date of sale as May 28, 1926. At the time and place named in said order no satisfactory offer for the property was received and no sale was confirmed. Later, on June 2, 1926, the trustee renewed the petition for sale, and an order was granted by the referee on the application of the trustee, fixing the date of sale as June 12, 1926, at which time the property was sold to the Security Mortgage Co. at and for the sum of $112,500.00, free of all liens. The trustee filed an application with the referee for direction as to confirmation of said sale, and the Security Mortgage Co., purchaser at said sale, likewise filed an application for the confirmation of the sale. On the 15th day of June, 1926, after hearing the parties at interest, the undersigned referee confirmed the sale of the property free of liens to the Security Mortgage Co., and no exceptions have been taken to the order confirming said sale.

Thereupon the Security Mortgage Co. filed its claim of lien and asked that said claim be allowed as a credit on the bid of the Security Mortgage Co. Thereupon the trustee filed exceptions to the allowance of said claim, and the issue for determination is on the order over-ruling the exceptions and allowing the claim as proved. The objections of the trustee to the claim of the Security Mortgage Co. [fol. 48] seek to disallow one item in the claim of $9,422.40 as attorney's fees. The referee's order allowed the claim for attorney's fees and the exception is on that issue.

The facts are not in controversy and may be briefly stated as follows:

The Florida Furniture Corp., purchased the real estate in question from the Hanson Motor Co. The Florida Furniture Corp., purchased said real estate subject to a lien evidenced by a loan deed made by the Hanson Motor Co., to the Security Mortgage Co., and assumed and agreed to pay said lien as a part of the consideration of the purchase. The note and deed evidencing the debt between the Hanson Motor Co. and the Security Mortgage Co., provide for the payment of 10% attorney's fees in the event the debt or the interest coupons were not paid as and when due, and in the event that the debt was collected by or

through an attorney at law. The security deed in question is dated the 24th day of February, 1925. An interest coupon was due on the 24th day of February, 1926. On April 1, 1926, the Security Mortgage Co. exercised its option to declare the principal note of $90,000.00 due and collectable in accordance with the terms of said note. The Florida Furniture Corp. was adjudicated to be a voluntary bankrupt on the 7th day of January, 1926. On the 1st day of April, 1926, the Security Mortgage Co., declared the debt due and gave the required notice to the Hanson Motor Co., of its intention to sue said claim in the City Court of Atlanta, and to claim in said suit the attorney's fees provided for in said note. On the 13th day of April, 1926, suit was instituted in the City Court of Atlanta upon the notes of the Hanson Motor Co., and judgment was rendered against the Hanson Motor Co., on the 4th day of May, 1926. Said judgment was made a special lien against the real estate in question. The real estate in question was then in the possession of a receiver appointed by this Court in [fol. 49] the ancillary jurisdiction; said receiver, R. A. Burnett, having been appointed on the 11th day of January, 1926. Execution was issued by the City Court against the Hanson Motor Co. and said execution by the City Court of Atlanta was adjudged to be a special lien upon the land in question. The execution was recorded on General Execution Docket 42, Page 126, of the records of the office of the Clerk of the Superior Court of Fulton County, Ga.

The sale of the property to the Security Mortgage Co., has been confirmed but at the date of the issuance of this certificate, the formal transfer by deed of the trustee to the Security Mortgage Co. has not been made, and the property remains in the possession of R. A. Burnett, as receiver in the ancillary jurisdiction. The transfer is being delayed pending the examination and approval of the title.

The referee allowed the attorney's fees for which judgment was rendered prior to the sale and prior to the date of the proof of the claim of the Security Mortgage Co., on the ground that the Florida Furniture Corp., bankrupt, having taken the property by deed subject to all of the conditions of the outstanding loan deed, is bound by said deed and all of the terms and conditions thereof; that the

trustee of the Florida Furniture Corp., is likewise bound; the right to assert and claim attorney's fees inheres in the original contract between the Hanson Motor Co. and the Security Mortgage Co.; that the trustee for the Florida Furniture Corp., took title subject to the rights of the Security Mortgage Co. under its contract with the Hanson Motor Co.

As necessary to the understanding of the issue raised, I transmit herewith:

(1) A certified copy of the proceedings from the District Court for the Southern District of Florida, to which is attached a copy of the order of adjudication and the order appointing a receiver.

[fol. 50] (2) The trustee's application for leave to sell the real estate, with various entries of service thereon, and order adjourning a proposed sale, filed March 12, 1926 [1926]. Also the renewal of the petition to sell and order endorsed thereon directing a sale, filed June 2, 1926.

(3) A certified copy of the order of the Judge of the District Court of the Southern District of Florida and the order endorsed thereon by the referee postponing the sale until the further order.

(4) The petition and order for confirmation of the sale, filed June 15, 1926.

(5) The Proof of Claim of the Security Mortgage Co., and the order allowing the same and over-ruling the objections of the trustee. Also the trustee's objections to said claim.

(6) The petition to review the referee's order allowing the claim.

This the 28th day of June, 1926.
Respectfully submitted,

Harry Dodd, Referee.

In United States District Court

Judgment Disallowing Lien of Attorney's Fees—Filed July 27, 1926

The petition of Charles A. Powers, Trustee in the above stated case to review an order of the Referee, allowing the claim of lien for Attorney's fees and ordering the same [fol. 51] paid out of the proceeds from the sale of real estate in the hands of the trustee, upon which the Security Mortgage Company claim a lien for attorney's fees on the real estate in the hands of the Trustee, by virtue of a judgment of the State Court, and to which claim Powers' Trustee filed objections which were over ruled on each and every ground, by the Referee, coming on to be heard, and after a hearing, the claim of lien of the Security Mortgage Company, objected to by Trustee, is disallowed as a lien upon the funds arising from the sale of real estate in the hands of the Trustee, and the order of the Referee heretofore made on June 25th, 1926, over ruling the objections filed by the Trustee to the allowance of the claim and over ruling the objections heretofore filed by the Trustee to the allowance of the claim of Attorney's fees as a lien, and ordering the same paid from the funds derived from the sale of real estate, is over ruled, and the claim of lien on the funds derived from the sale of real estate is denied, except for principal, interest and costs.

Dated this 26 day of July, 1926.

Sam'l H. Sibley, U. S. Judge.

In United States District Court

Stipulation as to Correctness of Parts—Filed Oct. 23, 1926

The undersigned, counsel of record in the above stated case hereby stipulate and agree that the facts set out in the certificate of Harry Dodd, Referee, to the Judge on the question of the allowance of the claim of Security Mortgage Company, filed in office June 29th, 1926, are true and that [fol. 52] said certificate contains all of the facts necessary

to a clear understanding of the issue made on appeal to the Circuit Court of the United States for the Fifth Circuit.

Candler, Thomson & Hirsch, Counsel for Security Mortgage Co., 1415 Candler Building, Atlanta, Ga. Asa W. Candler, of Counsel. Dillon, Calhoun & Dillon, Counsel for Chas. A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, 1045 Hurt Building, Atlanta, Ga. Clarence A. Calhoun, of Counsel.

In United States District Court

Petition for Appeal and Order Allowing Same—Filed Oct. 23, 1926

To the Hon. Samuel H. Sibley, District Judge:

The Security Mortgage Company feeling aggrieved by a decree rendered and entered in the above entitled cause on the 26th day of July, 1926, does hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herewith and it prays that its appeal be allowed and that Citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United [fol. 53] States Circuit Court of Appeals for the Fifth Circuit under the rules of such Court in such cases made and provided, and your petitioner further prays that the proper order relating to the required security to be required of it be made.

Candler, Thomson & Hirsch, Attorneys for Security Mortgage Company. Asa W. Candler, of Counsel.

Order Granting Appeal

The appeal of the said Security Mortgage Company is allowed and shall operate as a supersedeas upon said company filing a bond in the sum of $250.00 with sufficient sureties to be conditioned as required by law.

This, October 23, 1926.

Sam'l H. Sibley, United States Judge.

In United States District Court

Assignments of Error—Filed Oct. 23, 1926

Now comes the Security Mortgage Company, intervener in the above entitled cause, and filed the following assignments of error, upon which it will rely its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 26th day of July, 1926;

1. That the Court erred in disallowing the lien of attorneys' fees in the sum of $9,442.40 against the proceeds of [fol. 54] the property in the hands of the trustee in bankruptcy, although allowing appellant's lien for the principal, interest and costs.

2. Because the Court erred in not holding the judgment obtained by appellant in the City Court of Atlanta with regard to principal, interest costs and attorneys' fees, to be and constitute a prior lien on the funds in the hands of said trustee in bankruptcy as the proceeds of the sale of the real estate made by said trustee.

3. Because the Court erred in sustaining the objection made by the trustee to the intervention filed by appellant herein and in declining to set up as a good and valid claim of lien on the funds the principal, interest, costs and attorneys' fees on the judgment obtained by appellant in the City Court of Atlanta.

Wherefore, appellant, Security Mortgage Company, prays that said decree be reversed and that the Circuit Court of Appeals render such decree or order as may be proper on the record or that the Trial Judge of the District Court of the United States for the Northern District of Georgia, Atlanta Division, be instructed to enter such order or decree, as will charge said real estate with the full lien claimed by the said Security Mortgage Company for principal, interest, costs and attorneys' fees, and that said trustee in bankruptcy be instructed and ordered to pay said lien claim of the Security Mortgage Company in full.

Candler, Thomson & Hirsch, Attorneys for Appellant, Security Mortgage Company. Asa W. Candler, of Counsel.

[fol. 55] Bond on appeal for $250.00, approved and filed October 26, 1926, omitted in printing.

[fol. 56] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed October 23, 1926

To the Clerk of the United States Court for the Northern District of Georgia:

Please prepare a transcript of the record of the above named cause on appeal to the Circuit Court of Appeals of the United States for the Fifth Circuit, containing the following items:

1. Certified copy of the proceedings from the District Court of the United States for the Southern District of Florida, to which is attached a copy of the order of adjudication and the order appointing a receiver.

[fol. 57] 2. Certified copy of order of the District Court of the United States for the Southern District of Florida, postponing sale of the real estate, filed in the office of the Referee April 7th, 1926, and filed in the Clerk's office of this Court June 29th, 1926.

3. Trustee's application for leave to sell real estate with various entries of service thereon and the order adjoining proposed sale, filed March 12th, 1926.

4. Renewal of trustee's petition to sell and order indorsed thereon directing a sale, filed June 2nd, 1926.

5. Petition and order for confirmation of the sale, filed June 15th, 1926.

6. Proof of claim of the Security Mortgage Company and the order allowing same and overruling the objections of the trustee. Also, the trustee's objection to said claim.

7. The petition to review the Referee's order allowing the claim.

8. Certificate of Harry Dodd, Referee, on question of the allowance of the claim of the Security Mortgage Company, filed in office June 29th, 1926.

9. Order of Hon. Samuel H. Sibley, United States Judge for the Northern District of Georgia, Atlanta Division,

dated July 26th, 1926, on the petition to review and disallowing the lien sought by the Security Mortgage Company.

10. Stipulation as to facts signed by counsel of record.

11. The petition for appeal.

12. The order granting the appeal.

13. The assignments of error.

[fol. 58] 14. The costs and supersedeas bond, and order approving the same.

15. The citation on appeal with acknowledgment of service thereon.

16. The præcipe.

17. The Clerk's certificate and certificate of costs.

18. The entries of filing each and all the parts of the record above specified.

Candler, Thomson & Hirsch, Attorneys for Security Mortgage Co., by Asa W. Candler. Asa W. Candler, of Counsel.

Due and legal service of the above and foregoing præcipe is hereby admitted. This 23rd day of October, 1926.

Dillon, Calhoun & Dillon, Attorneys for Chas. A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, Bankrupt. Walter S. Dillon, of Counsel.

[fol. 59] Clerk's certificate to foregoing, omitted in printing.

NOTE RE CITATION

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 60] Minute entry of argument and submission, Oct. 3, 1927, omitted in printing.

[fol. 61] In United States Circuit Court of Appeals
Fifth Circuit

No. 5012

Security Mortgage Company, Appellant,

versus

Charles A. Powers, Trustee in Bankruptcy for Florida Furniture Corporation, Bankrupt, Appellee.

Before Walker, Bryan and Foster, Circuit Judges

Opinion—Filed Oct. 25, 1927

Foster, Circuit Judge:

In this case the material facts, which are stipulated, are these. The Florida Furniture Corporation was adjudicated bankrupt on January 7, 1926, and surrendered certain real estate purchased from the Hanson Motor Company, prior thereto, which property was burdened with a mortgage of $90,000 held by appellant. The deed of trust contained a provision for ten per cent attorneys' fees in the event [fol. 62] for foreclosure. At the time of adjudication in bankruptcy there was nothing due on the mortgage either in principle or interest but on February 24, 1926, an interest coupon fell due which was not paid. Pursuant to a clause in the mortgage, appellant declared the entire debt due on April 1, 1926, gave notice of intention to sue and brought suit in the City Court of Atlanta against the Hanson Motor Co. to foreclose the mortgage. Judgment was rendered by that Court May 4, 1926 for principle and interest due and attorneys' fees in the sum of $9,442.40, and execution was ordered to issue against the property. The property then was and had been in the actual custody of the bankrupt court, through the trustee, or a receiver, from the date of adjudication. Thereafter, on application of the trustee, appellee herein, the property was sold in the bankruptcy proceedings on June 12 1926, free of liens, without objection and was bought in by appellant for $112,500. Appellant then filed its claim for payment by preference out of the proceeds for the amount due under the mortgage, principle and interest, and attorneys' fees. The trustee ob-

jected to the allowance of the attorneys' fees, but the referee ruled against him, which ruling was subsequently reversed by the District Court. The only question presented on this appeal is as to the correctness of the order disallowing the attorneys' fees.

Appellant relies upon the provision of the Georgia code, par. 6037, permitting transfers of real estate burdened by a mortgage and deed of trust to be disregarded by the mortgage creditor and allowing suit to be brought against the original debtor, and cites John M. Mitchell Life Insurance Co. vs. Ross, Receiver, 162 Ga. 654, and Scott vs. Paisley, 271 U. S. 632. We conclude that this is beside the issue.

The attorneys' fees claimed were not a fixed liability at the time of bankruptcy and became a lien on the property, if at all, merely by virtue of the judgment of the State Court. There is no doubt that the property passed into [fol. 63] the custody of the District Court sitting in bankruptcy with the adjudication and no other court had jurisdiction to impress it with a lien not then in existence. Murphy vs. John Hoffman Co., 241 U. S. 586; in re Joseph Webre, 219 F. 417; In re Jno. T. Moore Planting Co., 237 F. 737.

As the rights of appellant could have been amply protected in the District Court, there was no occasion for the foreclosure.

We have repeatedly held that under similar conditions a claim for attorneys' fees is not allowable against the fund arising from the sale of mortgaged property in the hands of the trustee. In re Roach, 101 F. 956; Labaree vs. Citizens' Bank, 193 F. 648; British & American Mortgage Co., vs. Stuart, 210 F. 425.

We find no error in the record.

Affirmed.

[fol. 64] In United States Circuit Court of Appeals

[Title omitted]

Judgment—October 25, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Security Mortgage Company, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 65] In United States Circuit Court of Appeals, Fifth Circuit

[Title omitted]

Petition for Stay of Mandate—Filed November 18, 1927

To Hon. Rufus E. Foster, Judge United States Circuit Court of Appeals:

Now comes Security Mortgage Company, Appellant, and shows that it desires and intends to cause to be presented to a Judge of the Supreme Court of the United States, a petition for certiorari, to have the judgment of the Honorable Court in above stated case reviewed by the Supreme Court of the United States.

This petition is brought to your Honor in accordance with the Rules as formulated after approval on February 13th, 1925, and which became effective May 13th, 1925, particularly Subsection "D", of Section 8 of said Rules as promulgated.

It is shown it will take some time to prepare and have such petition for certiorari presented, as provided by law, and your Honor is hereby petitioned to grant a stay of execution of the decree and judgment, in said case, for the [fol. 66] statutory period of ninety (90) days from the date of the affirmance, which was October 25th, 1927, and the last day will be January 23rd, 1928, which petitioner shows is under the circumstances a reasonable time.

Appellant is prepared to enter into the bond required by said Section, and is hereby tendering to your Honor for approval, bond conditioned as provided in said Rules, which

it prays to have approved by your Honor, or that your Honor designate some official to whom same may be presented for approval.

Wherefore, appellant prays that your Honor will grant this petition, and order stay of execution for a period of ninety (90) days from the date of the judgment of affirmance, on October 25th, 1927, and until January 23rd, 1928.

(Signed) John E. Benton, Aldine & Hewitt W. Chambers, by Hewitt W. Chambers, Attorneys for Appellant.

[fol. 67] In United States Circuit Court of Appeals

[Title omitted]

Order Staying Mandate—November 18, 1927

Considering the application of the appellant in the above case, it is ordered that the mandate of this court be, and it is hereby withheld for a period of sixty (60) days from this date, provided that the appellant give bond in the sum of $1,000.00, to be approved by the undersigned, and with the condition that if the appellant fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting its application, or fails to make its plea good in the Supreme Court of the United States, it shall answer for all damages and costs which the appellee may sustain by reason of the delay;—said mandate to be issued at the expiration of the above stated time unless the application of the appellant for a writ of certiorari shall [fol. 68] then have been submitted to the said Supreme Court.

New Orleans, La., November 18th, 1927.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fols. 69 & 70] Bond for $1,000.00 approved; omitted in printing.

[fol. 71] Clerk's certificate to foregoing omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,114. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 662. Security Mortgage Company, petitioner, vs. Charles A. Powers, trustee in bankruptcy for Florida Furniture Corporation, bankrupt. Petition for writ of certiorari and exhibit thereto. Filed December 23d, 1927. File No. 33,114.